

FACSIMILE COVER SHEET

TO: Commissioner of Social Security
P.O. Box 17703
Baltimore, MD 21235-7703

FAX #: (410) 966-2830

SUBJECT: Comments re Docket No. SSA-2008-0033

FROM: Dale D. Glendening, Jr.
601 Pinetree Drive
Decatur, GA 30030

January 8, 2009

Attached please find comments re Docket No. SSA-2008-0033.

Thank you.

Dale D. Glendening, Jr.

TOTAL # OF PAGES: Five (5)

***Confidentiality/Privacy Notice - The documents included in this transmission may contain information that is confidential and/or legally privileged. If you are not the intended recipient, or the employee or agent responsible for delivering the information to the intended recipient, you are hereby notified that any disclosure, copying, distribution or action taken in reliance on the contents of these documents is strictly prohibited. If you have received this information in error, please notify the sender immediately to arrange for return or destruction of these documents.**

601 Pinetree Dr.
Decatur, GA 30030
January 8, 2009

Commissioner of Social Security
P.O. Box 17703
Baltimore, MD 21235-7703

Subject: Comments re Docket No. SSA-2008-0033

Dear Sir:

I am an U.S. Administrative law Judge assigned to the Social Security Administrative. However, I write and submit this comment in my personal capacity as a private citizen and not as a representative of the agency with whom I am employed.

This proposed change in the procedural rules is not a good idea. It will not alleviate the present difficulty and may in fact further aggravate and compound the existing problems. It is impossible to consider this proposal in the light of all the related issues without speculating as to what the real reason(s) behind this most impractical and ill-advised suggestion might be. Be that as it may, the rationale cited in the notice for justifying this proposed change is clearly without merit and flawed.

More specifically, it is claimed that the rule is being amended to "clarify that the agency is responsible" for scheduling the cases rather than the administrative law judge (ALJ) and there is confusion regarding this responsibility. For decades the Social Security Administration (SSA) has authorized its ALJs by regulation to direct the scheduling of cases for hearing. The authority and responsibility for this is quite clear as set forth in the plain language of the regulation: an ALJ shall "set the date, time and place of the hearing." What needs to be clarified?

It is stated that this proposed change "will ensure greater flexibility in scheduling hearings", "increase efficiency" and "increase productivity." There is no evidence that there is currently a problem with the flexibility of scheduling hearings or that there is any inefficiency in the scheduling process. Equally important, there is no evidence, empirical or otherwise, that the proposed rule change would in fact provide greater flexibility or increase efficiency. With regard to productivity, there is no evidence that this procedural change will increase productivity. Please note! For several years SSA ALJ dispositions per annum has increased significantly. Furthermore, the proposed change is void of any specifics as which employee(s) will be making decisions that a case is ready to be scheduled, what criteria will be used, or who will actually schedule cases for hearing.

One may reasonably conclude that the basis for this proposed change of authority and responsibility is a belief that ALJs are not scheduling nor hearing a sufficient number of cases resulting in an unacceptable number of cases being adjudicated. However, the reality is that ALJs are scheduling and hearing as many cases as they are singly or

collectively able (often under difficult and limiting circumstances.) Given this fact, it is reasonable to infer that the sole purpose of the proposed rule is to remove the control of scheduling from ALJs and place it into SSA management's hands to exercise greater control over ALJs and not, *per se*, the volume of cases being scheduled.

The rationale for this proposed rule change asserts that only a "small number of ALJs . . . may be affected by" the new rule. If in fact only a small number of ALJs would be affected, what then is the true purpose for such a drastic change from the current business process? As noted, *supra*, the primary and perhaps only purpose for the proposed change is to gain control over ALJs and ultimately the outcome of cases.

The proposed rule change rationale states that SSA is "committed to improving the efficiency of the hearing process." ALJs also share that same goal. Historically, SSA has embarked on numerous programs and initiatives which have proven to be ineffective and wasteful in most cases without meaningful input from ALJs. It appears that this is yet another proposal that, if enacted, will result in meaningless change that is poorly conceived and void of any reasonable expectation of achieving results cited to justify the proposal. At this juncture, such change would reflect mismanagement of the agency's resources and substantial waste of time, human resources and money.

The contention that removing ALJ control over the scheduling of cases "in no way interferes with the well respected role of ALJs to hear and decide cases" is patently absurd. Adjudicating cases involves ALJ decision-making at a number of steps, one of which is the decision whether a case is ready to be scheduled and heard. Because an ALJ will be conducting a full and fair hearing that requires both pre and post hearing development and deliberation and ultimate adjudication, the ALJ is clearly the person who should be the decision maker as to when cases should be scheduled and heard.

The proposed rule lends itself to the probable creation of conflict between an ALJ and whoever will be scheduling cases. If conflicts arise from management mishandling scheduling of cases the American public will be penalized for the inefficient and ineffective process. For example, if cases are scheduled outside an ALJ's duty day or more hearings are scheduled during a given time period than an ALJ is capable of hearing, time and resources will be wasted having to postpone and reschedule cases for hearings. If an ALJ is forced to hear more cases than he/she is capable of properly handling, it will affect the accuracy of decision making. If a case cannot be heard on its merits because it has been scheduled prematurely, it will result in a delay of the hearing necessitating the need for further development and the need to reschedule. Here one can clearly see that the proposal will not relieve the situation but rather enhance it. It will not break up the log jam but rather have the opposite affect. . .clogging the pipeline with more cases!

This proposed rule cites reasons, however such reasons do not reflect the reality that exists in many, if not all, of our hearing offices. Hearing offices experience many and varied problems attempting to schedule and hear cases. There are inadequate numbers of hearing rooms in many hearing offices (both regular hearing rooms and video conference

capable hearing rooms) Typically ALJs request more hearings than are scheduled because hearing offices are incapable of preparing cases for hearing, providing personnel support (including medical and vocational witnesses) to conduct the hearing and or providing a sufficient number of hearing rooms. Although the Agency is attempting to convert to more electronic video hearing, scheduling video hearings where ALJs preside from another location via television typically require more time to schedule because of the coordination that must occur. This proposal will not eliminate these problems.

The role of SSA ALJs is unique among judges in American administrative and judicial systems. SSA hearings conducted by ALJs are "non-adversarial", inquisitorial hearings. The government is not represented but a claimant is represented in a very high percentage of these cases. The SSA ALJ has a great burden to represent the interests of the SSA trust fund and the claimants in addition to deciding the case. In the current adjudicatory system, the SSA ALJ is in fact an adversary in some aspect of the case to the claimant as well as his advocate. An SSA ALJ has a regulatory burden of ensuring the case is properly developed prior to and after a hearing prior to adjudication. This includes obtaining outstanding evidence, ordering medical exams, ascertaining what witnesses if any are needed at a hearing. This is unlike any other judicial or administrative judge who simply relies on adversary counsel representing each party to prosecute and defend their respective cases in whatever manner they choose. The SSA ALJ's role requires making decisions throughout the adjudicatory process as opposed to simply presiding over a hearing from the bench that allows each party to present his or her case and then adjudicating that case. These are ALJ discretionary acts which impact the ultimate outcome of each case, and in the instant matter, *the power to control the development of the case is the power to control the outcome of the case*. The power to schedule the case can be used to affect the development and hence the outcome of the case.

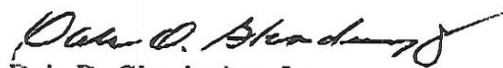
Clearly ALJs as professionals have different work habits and approaches to adjudication. Some ALJs are capable of "working" quicker than others; some ALJs can easily hear 6 to 8 hearings while others may only be capable of hearing 4 cases within the same time period. The complexity of cases varies as does the amount of time needed to conduct a hearing. ALJs work different duty hours as they are entitled being Federal employees. It is fallacious to assume that an ALJ does not have a solid work ethic or is not adequately working by the number of cases he/she may hear during a given time period.

In sum, the proposed rule change serves no meaningful purpose and cited rationale does not reasonably support such proposal. The proposed rule will not substantially improve the quantity or timeliness of processing and adjudicating pending ODAR cases thus substantially impact on the backlog problem. HOWEVER, the rule will remove an important step from ALJs who are the best and most appropriate people to decide when a case is ready for hearing. It will add yet another layer of administration, which is unspecified in the proposed rule, resulting in yet more handoffs of cases from one employee to another and unnecessarily increasing the chances for further delay in the timely processing of cases. Enacting the proposed rule would be simply another step in SSA crisis management with no reasonable gain other than to affect an ALJ's ability to

properly adjudicate cases as an independent decision maker in accordance with the principle of Due Process.

Thank you for considering my thoughts and opinions.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "Dale D. Glendening, Jr.", written in dark ink.

Dale D. Glendening, Jr.